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In The

Supreme Court of the United States

October Term, 1980

CYRUS HATAMI,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Cyrus Hatami, the petitioner herein, prays that a writ of certiorari issue to review the refusal of the Supreme Court of New Jersey to grant certification on April 29, 1980 in response to a petition for rehearing; the denial on February 15, 1980 of a petition for certification to the Supreme Court of the State of New Jersey; the affirmation of the judgment of conviction by the Appellate Division of the Superior Court of New Jersey upon reargument on November 21, 1979; the affirmation of the

judgment of conviction by the Appellate Division of the Superior Court of the State of New Jersey on June 27, 1979; and the Judgment of Conviction of October 13, 1977 by the Superior Court of the State of New Jersey for Monmouth County.

QUESTIONS PRESENTED

1. Whether the determination of the United States Supreme Court in *United States v. Chadwick,* 433 U.S. 1 (1977) and *Arkansas v. Sanders,* 99 S. Ct. 2586 (1979) carved out new law or a new variant of the Exclusionary Rule or if the Supreme Court reaffirmed the right that was created at the time of the adoption of the Fourth Amendment of the United States Constitution with respect to the requirement of a search warrant for the searching and seizing of personal effects contained within luggage in an automobile?

2. Whether a State may, without violation of the petitioner's constitutional guarantee against unlawful search and seizure refuse to apply the Exclusionary Rule retroactively with respect to searches and seizures that were executed prior to this Court's determination in *United States v. Chadwick, supra* and *Arkansas v. Sanders, supra.*

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JURISDICTION

The Supreme Court of the United States has jurisdiction to review the final judgment on a petition for certiorari pursuant to Title 28, United States Code, Section 1257, sub-paragraph (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On March 12, 1977 the petitioner was operating a motor vehicle, in the trunk of which vehicle was contained a duffel bag. Within the duffel bag were a pair of shoes and contained within the heels of such shoes was a quantity of a controlled dangerous substance.

Upon being stopped by the State Police, the trunk of the vehicle was opened, the duffel bag was opened and the heels removed from the shoes revealing the quantity of the controlled dangerous substance.

From the moment of the stopping of the petitioner's vehicle, the duffel bag and its contents came within the control of the police. The seizure of the vehicle and the arrest of the petitioner placed the duffel bag and its contents within the officers' exclusive control. The subsequent search of the duffel bag and the shoes contained therein took place without obtaining a search warrant.

An indictment was presented against the petitioner charging violations of New Jersey Statutes Annotated 24:21-19a(1) and New Jersey Statutes Annotated 24:21-19b(2) and a violation of the New Jersey Statutes Annotated 24:21-20a(2).

On May 5, 1977 a motion was made on behalf of the petitioner for the suppression of evidence that was obtained by means of a warrantless search and seizure on March 12, 1977. Such motion was denied on July 22, 1977 and the petitioner was tried on October 12, 1977 and October 13, 1977 by the court without a jury. On October 13, 1977, the trial court found the petitioner guilty of the various counts of the indictment.

On December 16, 1977, the petitioner was sentenced to twenty-five to thirty years on the First Count of the indictment and five to ten years on the Second Count with both sentences to run concurrently and consecutive to any other sentence previously imposed. A timely notice of appeal was filed on December 16, 1977.

On June 27, 1979, the judgment of conviction was affirmed by the Appellate Division of the Superior Court of the State of New Jersey. As a consequence of the determination of this court in *Arkansas v. Sanders, supra,* an application for a rehearing was granted and the Appellate Division of the Superior Court of the State of New Jersey once again affirmed the judgment of conviction on November 21, 1979. A petition for certification to the Supreme Court of New Jersey was denied on February 15, 1980 and a petition for a rehearing for a petition for certification was denied by the Supreme Court of the State of New Jersey on April 29, 1980.

Summary of Argument

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the New Jersey State Constitution require the obtaining of a search warrant for the searching of persons, houses, papers and effects. Certain well-defined exceptions have been set forth by judicial decision to validate warrantless searches. One of these is called the "Automobile Exception." The Appellate Division has based its determination to affirm the denial of the motion to suppress upon *Chambers v. Maroney*, 399 U.S. 42 (1970) and *Carroll v. United States*, 267 U.S. 132 (1925). In *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 6 L. Ed. 2d 235 (1979), the Supreme Court of the United States has drawn a distinction between the search of a motor vehicle based upon the "Automobile Exception" and the seizure and search of personal effects found in such motor vehicle.

In its determination of June 27, 1979, the Appellate Division relied upon *Chambers v. Maroney, supra*, and gave no weight to *United States v. Chadwick, supra*. In its determination of November 21, 1979, the Appellate Division based its decision on *Chambers v. Maroney* and set forth that *Chambers, supra* did not apply since it involved the seizure of a footlocker as it was being placed in the open trunk of a parked car and was not a motor vehicle search.

The Appellate Division also set forth that no effect could be given to *Chadwick* or *Sanders* inasmuch as neither one had been decided when the search took place in the within matter on March 12, 1977. The Appellate Division set forth that the Supreme Court of New Jersey had refused to apply the Exclusionary Rule retroactively in *State v. Howery*, 80 N.J. 563 (1979) the essence of *Howery, supra*, was that only prospective application would be accorded where there was a new constitutional principle. The petitioner has argued that no new constitutional principle evolved but rather that the Fourth Amendment has always been in effect and that *Sanders* was an

attempt by the State of Arkansas to extend the application of *Chambers* to receptacles found within an automobile and that that attempt was denied by both the Supreme Court of the State of Arkansas and the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

Whether the determination of the United States Supreme Court in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 99 S. Ct. 2586 (1979) carved out a new law or a new variant of the Exclusionary Rule or if the Supreme Court reaffirmed the right that was created at the time of the adoption of the Fourth Amendment of the United States Constitution with respect to the requirement of a search warrant for the searching and seizing of personal effects contained within luggage in an automobile.

Should the "Automobile Exception" to the warrant requirement of the Fourteenth Amendment extend to closed personal luggage of an arrestee found in the trunk of a car or should the arrestee's expectation of privacy in the contents of his luggage require the procurement of a search warrant? The issue before the Court is a confrontation between the "Automobile Exception" to the warrant requirement announced in *Carroll v. United States, supra,* and the holding in *United States v. Chadwick, supra* and *Arkansas v. Sanders, supra,* requiring the issuance of a search warrant before police entry into luggage held in police custody.

Initially it should be remembered that *Carroll, supra,* announced an exception to the warrant requirement based on practicalities arising from the mobility of the automobile and the fleeting opportunity to search. Therefore, an immediate roadside search of the vehicle of an arrestee is justified where probable cause exists. However, *Carroll, supra,* was and remains an exception to the warrant requirement.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) a case in which the Court evaluated a warrantless probable cause search of an automobile, the Court noted that "the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears." In reviewing the warrant requirement in *Coolidge, supra,* at 455-456 the Court stated:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by Judge or Magistrate are per se, unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions.' Katz v. United States, 389 U.S. 347, 357. The exceptions are 'jealously and carefully drawn', Jones v. United States, 357 U.S. 493, 499, and there must be a 'showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' MacDonald v. United States, 335 U.S. 451, 456. 'The burden is on those seeking the exemption to show the need for it.' United States v. Jeffers, 342 U.S. 98, 51. In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or extravagant to some. But the values were those of the authors of our fundament constitutional concepts. In times not altogether unlike our own they won by legal constitutional means in England and by revolution in this contingent — a right of personal security against arbitrary intrusion by official power. If times have changed reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made these values served by the Fourth Amendment more, not less important."

The Court's recognition of the continuing vitality of the majority's analysis in *Coolidge, supra,* appears in the language of *Mincey v. Arizona,* 98 S. Ct. 2408 at 2414 (1978), a case in which the Court rejected a "murder scene exception" to the warrant requirement.

> "Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the law. For this reason warrants are generally required to search a person's house or his person unless 'the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

In *Chambers v. Maroney, supra,* this Court held that a police officer with probable cause to search an automobile at the scene where it is stopped may later do so at the station house without first obtaining a warrant. There was a justification for the delayed search in *Chambers, supra,* in that the occupants in the car were arrested in a dark parking lot in the middle of the night and a careful search at that point was impractical and perhaps unsafe for the officers. *Chambers, supra,* at 52 n. 6. Nothing in *Chambers, supra,* suggests that the officers could search a suitcase clearly utilized as a repository of personal effects without first procuring a search warrant.

The inherent mobility of the object to be searched cannot, without more, justify a failure to secure a warrant. The question in each case is not simply whether the item searched is movable;

rather the question is whether, in light of the realities of the situation, there was a reasonable likelihood that the item would be moved before a warrant could be obtained. Where the possibility of movement is only remote or speculative, the police are simply not confronted with the kind of urgency which would excuse them from the warrant requirement. *See Coolidge v. New Hampshire, supra.*

In *United States v. Chadwick,* 97 S. Ct. 2476 (1977) the United States Supreme Court said on page 2482:

> ". . . In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides. . . . Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable. Nevertheless, we have also sustained 'warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent.' *Cady v. Dombrowski,* 413 U.S. 433, 441-442, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706 (1973); accord, *South Dakota v. Opperman,* 428 U.S. at 368, 96 S. Ct. at 3096.
>
> The factors which diminish the privacy aspects of an automobile do not apply to respondents'

> footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person s expectations of privacy in personal luggage are substantially greater than in an automobile.
>
> Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston federal building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant."

The attention of the Court is also respectfully directed to Footnote No. 8 on page 2485, which reads as follows:

> "Respondents' principal privacy interest in the footlocker was of course not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the

> footlocker. Though surely a substantial infringement with respondents' use and possession, the seizure did not diminsh respondents' legitimate expectation that the footlocker's contents would remain private. It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage."

The Court concluded its determination on page 2486 as follows:

> ". . . In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched come under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded."

In its decision of June 27, 1979 the Appellate Division set forth that the within matter is controlled by *Chambers v. Maroney, supra.* The Appellate Division went on to say that it felt that this might even be a stronger case inasmuch as the search took place at the scene of the arrest. The Appellate Division quoted language from *Chambers, supra,* which set forth authority for the search of the vehicle without a search warrant. The language quoted from *Chambers, supra,* did not in any way concern itself with the search of anything contained within the car but rather discussed solely the search of the vehicle itself.

It is respectfully submitted that the Appellate Division concerned itself solely with probable cause and at no time did it address itself to the question of exigent circumstances.

The requirement to obtain a search warrant requires not only the presence of probable cause but there must be a determination of exigent circumstances. That is set forth specifically in *Carroll v. United States, supra,* and in *Chambers v. Maroney, supra.*

In the Appellate Division's determination of November 21, 1979 it set forth its conclusion that the search herein passed constitutional muster under the so-called "Automobile Exception" to the Warrant Clause, and cited *Chambers v. Maroney, supra.* The Appellate Division went further and set forth that prior to *Arkansas v. Sanders* there was no decision of the United States Supreme Court which forbade the search of luggage uncovered during an otherwise valid but warrantless automobile search. The Appellate Division distinguished *United States v. Chadwick, supra,* by setting forth that it was not a motor vehicle search but was a luggage search. The Appellate Division further set forth that *State v. Howery, supra,* would prevent the application of the Exclusionary Rule retroactively.

The Appellate Division erred originally and compounded that original error in its second determination. Nothing in *Chadwick* and *Sanders* contravened the right of police officers to search without a warrant where there is probable cause and an exigent circumstance. That is the "Automobile Exception" and it is to be applied in limitation of the rights granted by the Fourth Amendment to the United States Constitution and Article I, Section 7 of the New Jersey State Constitution when both elements are present. Lacking both of the elements needed to create the exception the rights granted under the Fourth Amendment to the United States Constitution continued to be effective. In *Sanders, supra,* the application of the State of Arkansas was to extend the scope of the "Automobile Exception". When the Arkansas Supreme Court and this Court

refused to extend the scope of that exception it did not carve out a new law or a new variant of the Exclusionary Rule. The courts reaffirmed a right that was created at the time of the adoption of the Fourth Amendment which predated, by almost two centuries, the "Automobile Exception" developed in *Carroll* and *Chambers*. As further evidence that the court relied on the Fourth Amendment as the law which was the controlling factor in *Sanders* and not the creation of new law, the attention of the Court is respectfully directed to following portion of *Sanders:*

> "We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search after the police have seized the object to be searched and have it securely within their control. See 433 U.S., at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.
>
> Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a

repository for personal items when one wishes to transport them. *Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles. We therefore find no justification for the extension of Carroll and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.*

In sum, we hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. *Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway.* Where — as in the present case — the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, the unconstitutional right of suspects to prior judicial review of searches will be fully protected.

The judgment of the Arkansas Supreme Court is affirmed." (Emphasis ours.)

In a concurrent opinion Mr. Chief Justice Burger set forth:

". . . The warrant requirement is not so onerous as to command suspension of Fourth

> Amendment guarantees once the receptacle involved is securely in the control of the police as it was after Sanders' arrest.
>
> . . . Here, as in Chadwick, it was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case, the Court need say no more."

Sanders clarifies that this is not the creation of a new law but rather a denial by the United States Supreme Court to extend *Carroll* to validate warrantless searches of personal luggage solely because of their being located in an automobile lawfully stopped by the police. *Sanders* sets forth that the police can only search without a warrant luggage found in a motor vehicle based upon some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. The United States Supreme Court has most unequivocally set forth that *Chambers v. Maroney, supra,* cannot be justification for the warrantless search of luggage found within the trunk of a motor vehicle.

As has been noted herein above the Supreme Court of the State of Arkansas and this Court have refused to extend the scope of the "Automobile Exception" to the warrantless search of personal effects contained within an automobile. To give further effect to the determination of the Appellate Division of the Superior Court of the State of New Jersey as reflected herein would be to actually extend the scope of the "Automobile Exception" as set forth in *Chambers v. Maroney, supra.* The

opinions of the Appellate Division bear this out inasmuch as the opinion of June 27, 1979 set forth its total reliance on *Chambers v. Maroney* and the second opinion of November 23, 1979 declared that it was still relying upon *Chambers v. Maroney* and attempted to distinguish *Chadwick* by setting forth that it was not an "Automobile Exception" case. The Appellate Division had the benefit of this Court's opinion in *Sanders, supra,* prior to making its second determination and the Appellate Division ignored the finding of this Court and found that the fact that the luggage came from an automoble detracted from the petitioner's right of privacy because there is in existence something called the "Automobile Exception".

The granting of the petition for a writ of certiorari herein will serve to advise the State of New Jersey that it is bound to give the literal effect to the content of the Fourth Amendment to the United States Constitution and that the State of New Jersey, no more than the State of Arkansas, cannot be allowed to delimit the effect of the Fourth Amendment by an extension of the scope of the "Automobile Exception".

II.

Whether a State may, without violation of the petitioner's constitutional guarantee against unlawful search and seizure refuse to apply the Exclusionary Rule retroactively with respect to searches and seizures that were executed prior to this Court's determination in *United States v. Chadwick, supra* and *Arkansas v. Sanders, supra.*

On November 21, 1979 the Appellate Division, while affirming the petitioner's conviction based upon *Chambers,* also took the position that the petitioner was not entitled retroactively to rights conferred by the Fourth Amendment and the references thereto in *Chadwick* and *Sanders.* In *State v. Howery,* 80 N.J. 563 (1979), the court refused to apply retroactively the rule of *Franks v. Delaware,* 438 U.S. 154 (1978)

to a case which was in the appellate review process at the time *Franks* was decided. For several reasons, this argument lacks merit.

Judicial consideration of the retroactive effect of rulings which affect the constitutional rights of citizens has produced less than an ideally symmetrical pattern. In the area of the Fourth Amendment, prior to 1965, such rulings were normally given broad retroactive effect. In *Linkletter v. Walker,* 381 U.S. 618 (1965), the United States Supreme Court held that the Exclusionary Rule of *Mapp v. Ohio,* 367 U.S. 643 (1961) should not apply to cases before the Court in the context of collateral attack, though it implicitly approved retroactive application to cases not yet reduced to final judgment. *See also, State v. Smith,* 37 N.J. 481 (1962).

Subsequently, in *Desist v. United States,* 394 U.S. 244 (1969), the Court ruled that the direct appeal/collateral review distinction was not ironclad and that "there are no jurisprudential or constitutional obstacles to a different cut-off point." *Id.* at 252. In so stating, the Court focused on the deterrent effect of the Exclusionary Rule and the reasonable reliance of law enforcement officers on the previously established rule at the time of the challenged search. *Id.* at 253. Adhering to the principle that judicial discretion is applicable in determining retroactivity, the New Jersey Supreme Court also noted that "there is no constitutional imperative which regulates or fixes the cut-off date for application of a *formerly valid rule,* or the date from which the *new or replacement rule* must operate." *State v. Vigliano,* 50 N.J. 51, 65 (1967) (emphasis added).

Later, in *State v. Nash,* 64 N.J. 464 (1974), the court established guidelines for the use of judicial discretion in determining the degree of retroactivity to be accorded a new ruling. In making such a determination, said the court, the competing considerations "are weighed by examining (1) the

purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." *Id.* at 471.

It is significant that the issue of whether to apply a rule retroactively is intimately related to the issue of whether the rule announced is a "new" rule. *See generally,* 3 La Fave, *Search and Seizure* 692-97 (1978). As made clear in *Desist v. United States, supra,* only new rules, which clearly depart from previously established norms of behavior as sanctioned by statutory or decisional law, would be denied retroactive application. This is so because law enforcement officers should not be penalized for acting in accordance with a clear legal mandate existing at the time of the search. *See also, United States v. Peltier,* 422 U.S. 531 (1975).

Such was the case which confronted the court in *State v. Howery, supra.* There, defendants, on appeal, sought to challenge the facial sufficiency of the search warrant, the execution of which led to their arrests. At the time of the search, and indeed at the time of the trial, such a challenge was clearly and directly disallowed under *State v. Petillo,* 61 N.J. 165 (1972), *cert. den.,* 410 U.S. 945 (1973). Subsequent to defendants' convictions, however, the holding of *Petillo* was nullified by the United States Supreme Court in *Franks v. Delaware, supra.* Applying the standards of *State v. Nash, supra,* the court concluded that *Franks* established a "new constitutional principle" which should not accrue to the defendants, whose convictions were obtained "in good faith reliance on 'then-prevailing constitutional norms.'". *State v. Howery, supra,* at 569-579. As to the third standard of *Nash,* the court concluded that "the effect of retroactive application of *Franks* on the administration of justice would be significant. It would require courts to delve into the allegations of what would doubtless be a considerable number of defendants, to the effect that police officers had lied in affidavits long stale."

The cardinal principle of the Fourth Amendment is that a warrant is required unless some grave emergency can be shown that necessitates an immediate search without a warrant. When those circumstances do not exist the exception also does not exist and a warrant must be obtained. This is the rationale of *Chadwick* and *Sanders*. In view of the principle that a warrant is required unless the circumstances dictate otherwise, it is evident that *Chadwick* and *Sanders* did not enunciate a new rule of law. Therefore, no retroactivity problem is encountered in applying *Chadwick* and *Sanders* to this case.

The Appellate Division, however, decided that *Sanders* was the promulgation of a new variant of the Exclusionary Rule. As has been set forth, Sanders did not enunciate new law but rather set forth that it would not extend the scope of the previously defined "Automobile Exception" to negate the requirement of obtaining a warrant for the search of luggage found within automobiles. The Supreme Court of the United States was not enunciating a new rule but instead underscored the constant requirement of obtaining warrants except within certain well-defined exceptions. The invalidity of the search in the within matter is not as a result of *Chadwick* and *Sanders* but because the fact situation did not fall into any accepted exception.

The opinion in *Sanders* stresses the fact that the "Automobile Exception" did not go so far as to permit warrantless searches of luggage contained in automobiles. This was not the creation of a new constitutional principle but rather a restatement of the rights created by the Fourth Amendment. It cannot be said that police officers had understood *Chambers v. Maroney* to allow the search of anything found within an automobile and that *Chambers v. Maroney* justified the actions in this case until the promulgation of *Sanders*. To accept that would set forth that police officers were more cognizant of *Chambers v. Maroney, supra,* than they were of *Coolidge v. New Hampshire*. It would also require the conclusion that police officers were totally unaware of the contents of the Fourth Amendment of the United States Constitution.

Retrospective application of *Chadwick* and *Sanders* would be in conformity with the determinations made in the past by the courts of the State of New Jersey. A detailing of such decisions would show that such was the case until *Howery* was decided. As a consequence a prospective application of *Chadwick* and *Sanders* would serve to deprive the petitioner of his rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

The events which are the subject of the two counts of the indictment took place on March 12, 1977. The hearing to suppress took place on June 24, 1977 and on July 15, 1977. A denial of the motion to suppress was issued by the Court on July 22, 1977. Thereafter, the petitioner was tried on October 12, 1977 and October 13, 1977 and was convicted on October 13, 1977. The decision in *United States v. Chadwick*, 97 S. Ct. 2476 was made on June 21, 1977 and *Arkansas v. Sanders*, 99 S. Ct. 2586 was decided on June 20, 1979.

Since the within matter was on direct appeal at the time of the determination in *Arkansas v. Sanders* and the petitioner had not been tried when *Chadwick* was decided, *Sanders* and *Chadwick* should be retrospectively applied.

In *State v. Branam*, 161 N.J. Super. 53, 390 A. 2d 1186 (App. Div. 1978) on p. 1189, the Appellate Division said:

> "Nevertheless, the State herein contends that because Talbot was handed down 18 months after commission of the instant offenses, a charge in conformity with that opinion would give to it an impermissible retroactive effect. The State asserts that Talbot merely sets forth a prophylactic rule designed to deter unacceptable police conduct and that, because the police action here is beyond deterrence, retroactive application of the rule would be meaningless. It adds that the

police here had also relied in good faith upon the State of the law prior to Talbot which gave no indication that such conduct contravened 'fundamental fairness.'

We disagree. Without enumerating the many considerations which may determine whether or not a decision is to have retroactive effect, and the many decisions concerning them, we determine that the Talbot rule applies to all cases then pending for trial or on direct appeal. We note that the Talbot court did not declare that its decision was to have only prospective effect. See State v. Deatore, 70 N.J. 100, 119, 358 A.2d 163 (1976). Moreover, in Linkletter v. Walter, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1966), which considered whether Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), should be applied to state court convictions which had become final before that decision was rendered, *the court indicated that the general rule is that appellate courts ordinarily will give effect to the state of the law as it exists at the time of the appeal, thus giving retroactive effect to a decision at least insofar as such decision may affect cases on direct appeal at the time it is rendered.* See Walker v. N.J. Dept. of Inst. & Agencies, 147 N.J. Super. 458, 489, 371 A.2d 732 (App.Div. 1977), and cases cited therein." (Emphasis ours.)

Although it has been set forth that the principal effect of *State v. Nash, supra,* is with respect to the determination of a new rule *Nash* also agreed that retrospective application of the new rule can be resorted to where the matter is still within the area of final direct review. On p. 692 the Court said:

> "Another form of limited retroactive effect permits the new rule to govern the rights of the parties to the overruling case and the rights of parties to other cases pending, in the sense of final direct review not having been exhausted, when the overruling case was decided. The old rule applies to the rights of parties in cases terminated by a final judgment no longer appealable at the time of the decision in the case declaring new law. E.g., Linkletter v. Walker, supra (exclusion of illegally seized evidence); Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) (prosecutor's) comment on defendant's failure to testify); State v. Koch, supra (use of uncounselled prior conviction to affect credibility).
>
> . . . As the first paragraph of this opinion indicates, we adopt in this case, for the reasons expressed herebelow, the third approach holding DeBonis retroactive to all cases pending on direct appeal when that decision was announced on April 8, 1971)."

The attention of the Court is also respectfully directed to *State v. Brockington*, 89 N.J. Super. 423, 215 A. 2d 362 (App. Div. 1965) where on p. 364 the court said:

> "One of these grounds clearly calls for reversal. It is addressed to the trial judge's charge on defendant's failure to take the stand. The State confesses error. Since this is a direct appeal, Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (April 23, 1965), decided after the entry of the judgment of conviction, must be given retroactive effect. State v. Lanzo, 44 N.J. 560, 210 A.2d 613 (1965); and see State v. Jacques, 86 N.J. Super. 386, 207 A.2d 165 (App. Div. 1965)."

To the same effect *State v. Jacques,* 86 N.J. Super. 386, 207 A. 2d 165 (App. Div. 1965) said:

> "The question here is whether Malloy should be applied to a conviction obtained at about the time of the coming down of that decision, where the conviction is on direct appeal. A similar problem was presented after the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), rehearing denied, 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961), where the court held that the Federal Constitution barred the use by a state of evidence seized as a result of an illegal search and seizure. In State v. Smith, 37 N.J. 481, 483 et seq., 181 A.2d 761 (1962), certiorari denied, 371 U.S. 835, 83 S.Ct. 1879, 10 L.Ed.2d 1055 (1962), our Supreme Court held that Mapp would be applied retroactively to cases then pending or on appeal. But see State v. Smith, 43 N.J. 67, 78-79, 202 A.2d 669 (1964), holding that Mapp would not be given retroactive effect in a collateral attack upon a prior judgment of conviction no longer subject to direct appeal.
>
> Since this is a direct appeal, we hold that Malloy v. Hogan, above, must, in the circumstances of the present case, be given retroactive effect, and this by analogy to our treatment of the search and seizure problem under Mapp. Our reading of the entire record convinces us that essential justice so requires. A like result was reached in State v. Murphy, 85 N.J. Super. 391, 204 A.2d 888 (App. Div. 1964)."

The petitioner should not be charged with the failure to anticipate the decision in *Arkansas v. Sanders, supra,* and its effect upon the admissibility of evidence. The petitioner timely

raised a constitutional issue which should have been considered on his direct appeal and the record of conviction should have been reviewed in the light of *Arkansas v. Sanders* notwithstanding the predated trial. *See State v. Evans,* 75 N.J. Super. 319, 183 A. 2d 137, 140, 141 (App. Div. 1962). *See also, State v. Smith,* 37 N.J. 481, 181 A. 2d 761, 765 (1962).

The attention of the Court is also respectfully directed to *State v. Masi,* 72 N.J. Super. 55, 177 A. 2d 773 (Law, 1962) where the court said:

> "The matter of retrospective application of principles of law established by judicial decision was dealt with specifically in Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950). In a per curiam opinion the court said, 'A change of the established law by judicial decision is retrospective. It makes the law at the time of prior decisions as it is declared in the last decision, as to all transactions that can be reached by it. On the other hand a change in the settled law by statute is prospective only.' State v. Smith, 32 N.J. 501, 161 A.2d 520 (1960) cited by the State, is not to the contrary. There the court affirmed a conviction and held that the proceedings as to the admissibility of a confession were not prejudicially erroneous. A majority of the court (four in number), however, stated in a concurring opinion that they preferred a different approach and set forth their views 'for the future guidance of the trial bench.' No such approach was applied in the Mapp case. The United States Supreme Court held that the evidence seized should be suppressed and the conviction was reversed. Their decision was retrospectively applied in that case. This court is bound to apply the rule of Mapp v. Ohio to every case in which the issue is properly raised. State v.

Valentin, 36 N.J. 41, 174 A.2d 737 (1961). Here the attack upon the search and seizure was raised by a timely application upon motion prior to trial. The case must be decided upon the basis of the law as it presently exists, in spite of the fact that the law was otherwise at the time of the seizure. Fox v. Snow, supra."

CONCLUSION

For the foregoing reasons and based upon the foregoing authorities the petitioner prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Supreme Court of New Jersey and the Superior Court of New Jersey. In the event that the petition is granted, the petitioner prays that the conviction herein be reversed and the motion to grant suppression of evidence seized as the result of a warrantless search be suppressed.

Respectfully submitted,

ROBERT E. LEVY

LEVY & ROBERTSON
Attorneys for Petitioner

APPENDIX

OPINION OF THE APPELLATE DIVISION DATED JUNE 27, 1979

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1567-77

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CYRUS HATAMI,

Defendant-Appellant.

Argued: May 29, 1979 — Decided: June 27, 1979

Before Judges Pressler and King.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

Mr. Robert E. Levy argued the cause for appellant (Messrs. Levy & Robertson, attorneys).

Mr. Steven Secare, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney).

PER CURIAM

Defendant appeals on the sole ground that the police officer's search of his rented motor vehicle at the scene of his arrest violated his right to be free of unreasonable searches and

seizures under the State and Federal constitutions. Defendant was convicted at a bench trial of possession of heroin in violation of *N.J.S.A.* 24:21a(2), and possession of heroin with intent to distribute, contrary to *N.J.S.A.* 24:19a(1) and *N.J.S.A.* 24:21-196(2). A violation of the latter section requires proof of "at least 3.5 grams of pure free base" and is punishable "by imprisonment for up to life." *Ibid.* Following conviction defendant was sentenced to an aggregate term of 25 to 30 years in State Prison consecutive to any other sentences.

The following facts were presented by the police witnesses and fully credited by the trial judge. Defendant's arrest was the culmination of law enforcement officers' attempts to execute federal indictment warrants outstanding against him for conspiring to import heroin into this country. The federal warrants for the arrest of defendant were received by the New Jersey State Police on March 11, 1977. Suspicion of defendant's whereabouts focused on an apartment at 31 Cedar Avenue in Long Branch which was placed under 24-hour surveillance on that date. The apartment was determined to have been rented by Curt and Yvette Spichelmier also named in the federal warrants and indictment.

At about 1:30 p.m. on March 12, a red 1977 Ford Granada pulled into a parking lot next to the apartment and defendant and one Williams emerged from the vehicle and entered the apartment. Defendant carried a red airline-type shoulder bag inside. A motor vehicle check by the surveillance team revealed that the Granada had been rented to the defendant by a Freehold agency.

At about 2:35 p.m. two persons, Gordon and Knipple, left the apartment. Just before driving away in their car, Gordon was observed putting something under the dashboard, the police followed the Gordon vehicle, intercepted it, found a jar of white powdery substance under the dashboard and arrested Gordon and Knipple.

Other officers remained at the surveillance site and at 3:15 p.m. observed defendant and Williams leaving the apartment. Defendant was observed carrying a brown gym bag and not the shoulder flight bag he carried earlier. Defendant placed the gym bag in the trunk of the rented car and drove away. The officers followed.

The officers originally intended to follow defendant to his next destination. However, the intervening discovery of suspected narcotics in the Gordon and Knipple vehicle which information was relayed to the surveillance team and the "erratic" manner in which defendant was operating his vehicle prompted a change in plans. The police observed defendant over-compensating at curves and crossing over the center line so the decision was made to stop the vehicle and effect defendant's arrest at the Eatontown traffic circle.

To this end, an advance police unit was parked at a service station adjacent to the traffic circle and a plain clothes detective walked into the roadway. As defendant's vehicle approached the circle it was observed veering sharply to the right to avoid striking the car at its front. The plain clothes officer approached the defendant's vehicle, displayed his State Police identification and demanded that defendant shut off the engine. The tailing police vehicle arrived at the scene at this point.

After defendant failed to respond to repeated police requests to turn off his engine, one of the officers reached into the car and turned the ignition off. Thereupon, defendant and Williams were ordered out of the car. Defendant appeared dull-witted and sluggish. His speech was slurred, his eyes were bloodshot and he "appeared to be under the influence." There was a strong odor of marijuana upon his hair and clothes. As defendant was led to a nearby parking lot he appeared to be staggering. Defendant was placed under arrest pursuant to the federal warrants and for being under the influence of a controlled dangerous substance.

Opinion of the Appellate Division Dated June 27, 1979

While the defendant was being questioned one of the officers drove defendant's rented vehicle off the roadway onto an adjacent parking lot. A search of defendant's person revealed no weapons or contraband.

The car was then searched at the scene of the arrest. Nothing was found in the passenger compartment. A search of the trunk revealed the brown gym bag. The police opened the gym bag and discovered several items relating to narcotic trafficking including an Ohaus gram scale, an electric blender, and several white jars similar to the one recovered earlier from the Gordon vehicle. The bag also contained a pair of women's platform shoes. Inspection of the shoes at the scene revealed fresh white glue around the soles. The police removed the heels and discovered a number of condoms containing heroin inside the hollowed-out heels. The police had no search warrant. Defendant contends that a warrant was necessary before the police could search his rented car and that this on-the-scene search contemporary with his arrest pursuant to the federal warrants and the under the influence charge violated his constitutional right. Defendant does not question the officers' right to arrest.

We disagree and find this case to be controlled by *Chambers v. Maroney*, 399 *U.S.* 42 (1970). See also *State v. Ercolano*, 79 *N.J.* 25, 32-33 (1979). Indeed this may be a stronger case as the search took place at the scene of the arrest. In *Chambers* the search was made after the vehicle was seized and taken back to the police station. In *Chambers* the weapons used in the robbery and the fruits of the crime were discovered "concealed in a compartment under the dashboard." *Id.* at 44. Here they were discovered in a gym bag in the trunk. In *Chambers* the Supreme Court squarely held that the arresting officers had the right to make a prompt on-the-scene search of the entire vehicle coincidental with the valid arrest of the occupant on felony-type charges so long as probable cause existed to search.

Opinion of the Appellate Division Dated June 27, 1979

We have no doubt that sufficient probable cause existed at the scene for the arresting officers to believe that defendant's rented car contained drugs and drug-related paraphernalia based on the amalgam of facts known to the police at the time of defendant's arrest.

We find the following language from *Chambers* apposite to this situation:

> . . . For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either couse is reasonable under the Fourth Amendment.
>
> On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. The same consequences may not follow where there is unforseeable cause to search the house. Compare *Vale v. Louisiana*, 399 *U.S.* 30, 20 *L.Ed.* 2d 409, 90 *S.Ct.* 1969. But as [*Carroll v. United States*, 267 *U.S.* 132, 45 *S.Ct.* 280, 69 *L.Ed.* 543 (1924)]

> held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars. [399 *U.S.* at 52].

The trial judge properly denied the motion to suppress because the police had probable cause to search defendant's vehicle and the trunk's contents at the time of his arrest.

Affirmed.

A true copy
s/ Elizabeth McLaughlin
Clerk

OPINION OF THE APPELLATE DIVISION DATED NOVEMBER 21, 1979

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1567-77

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CYRUS HATAMI,

Defendant-Appellant.

Argued: May 29, 1979 — Decided: June 27, 1979
Reargued: November 7, 1979 — Decided: November 21, 1979

Before Judges Pressler and King.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

Robert E. Levy argued the cause for appellant (Levy & Robertson, attorneys).

Allan J. Nodes, Deputy Attorney General, argued the cause for respondent (John J. Degnan, Attorney General of New Jersey, attorney).

PER CURIAM

Our opinion in this matter was initially filed on June 27, 1979, before the text of the decision of the United States Supreme Court in *Arkansas v. Sanders*, ____ *U.S.* ____ (1979)

(decided on June 20, 1979) was available to us. On July 23, 1979 we granted defendant's petition for rehearing in order to reassess his appellate contentions in light of *Arkansas v. Sanders, supra.* Thereafter, the opinion of our Supreme Court in *State v. Howery,* 80 *N.J.* 563, 568-571 (1979) (decided July 20, 1979) became available to us.

The search in the case before us took place on March 12, 1977. In our initial opinion we decided that this warrantless search of defendant's vehicle, which led to discovery of the substantial amount of heroin concealed in the wooden heels of the shoes in the gym bag located in the truck, passed constitutional muster under the so-called "automobile exception" to the Warrant Clause. We stand on that conclusion. *Chambers v. Maroney,* 399 *U.S.* 42 (1970).

Prior to the United States Supreme Court's decision in *Arkansas v. Sanders, supra,* there was no decision of that Court which forbade the search of luggage uncovered during an otherwise valid, but warrantless, automobile search. Arguably, *United States v. Chadwick,* 433 *U.S.* 1 (1977), decided on June 21, 1977, could have been so-construed, but we view the seizure there of the footlocker as it was placed in the open trunk of a parked car as a luggage search, not a motor vehicle search. See discussion in *Arkansas v. Sanders,* ____ *U.S.* ____, ____ (1979) (concurring opinion of Chief Justice Burger with whom Justice Stevens joined).

In any event, constitutional limitations on the search of luggage seized with probable cause during a valid warrantless search of motor vehicle were not clearly established until *Arkansas v. Sanders, supra,* was decided on June 27, 1979. Neither *Chadwick* nor *Sanders* had been decided when the search in the present case was made on March 12, 1977. In *State v. Howery, supra,* 80 *N.J.* at 569, our Supreme Court refused to apply the exclusionary rule retroactively. Our Supreme Court

concluded that the deterrent purposes of the exclusionary rule were not served by retroactive application, especially where the reliability of the evidence was unquestioned. See *United States v. Peltier*, 422 *U.S.* 531 (1975). We conclude here, as well, that the "new variant of the exclusionary rule", confirmed by *Sanders* and perhaps presaged by *Chadwick*, should have prospective effect only. *Ibid.* See also *United States v. Montgomery*, 558 F. 2d 311 (5 Cir. 1977); *Nastu v. State*, 26 *Cr. L.* 2117 (Tex. Crim. App. 1979).

We hold therefore that since the search in the instant case was valid when made it may not be attacked retrospectively, even on direct appeal.

Affirmed.

A true copy

s/ Elizabeth McLaughlin
Clerk

ORDER DENYING PETITION FOR CERTIFICATION DATED FEBRUARY 11, 1980

SUPREME COURT OF NEW JERSEY
C-391 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CYRUS HATAMI,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1567-77 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of February, 1980.

s/ Stephen W. Townsend
Clerk

FILED
Feb. 15, 1980

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIFICATION DATED APRIL 29, 1980

SUPREME COURT OF NEW JERSEY
M-708 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent

vs.

CYRUS HATAMI,

Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of order denying petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 29th day of April, 1980.

s/ Stephen W. Townsend
Clerk

FILED
Apr. 30, 1980

RELEVANT STATUTES

N.J.S.A. 24:21-19a(1):

> "a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:
>
> 1. To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance. . . ."

N.J.S.A. 24:21-19b(2):

> "b. Any person who violates subsection a. with respect to:
>
> 2. A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than $25,000.00, or both. . . ."

N.J.S.A. 24:21-20a(2):

> "a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his

professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

2. A substance, in quantity of 1 ounce or more including any adulterants or dilutants, classified in Schedule I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 7 years, a fine of not more than $15,000.00, or both. . . ."